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No. 86-996

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

McKENZIE COUNTY SOCIAL SERVICES BOARD, S.N.F., THROUGH MICHON SAX AS GUARDIAN AD LITEM, AND C.F.,

Petitioners,

vs.

V.G.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF IN OPPOSITION

ANDREW M. SMALL
Suite 2101, Sheraton Plaza
27 North 27th Street
Billings, Montana 59101
(406) 259-2518

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the exercise of state jurisdiction to determine the parentage of an Indian child residing on the Reservation, whose natural mother and putative father are members of the same Indian Tribe, interferes with Tribal powers of self-government and undermines the authority of Tribal courts over Reservation affairs and thereby infringes on the right of Indians to govern themselves.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Authorities iii

Jurisdictional Statement 1

Statement of the Case 2

Reasons for Not Granting the Writ:

I. Petitioner's assertions fly in the face of one hundred fifty years of federal Indian legal history and the decisions of this court recognizing the right of Indian tribes to exclusive jurisdiction over the domestic relations of their members. 3

II. This is a case to determine paternity between enrolled members of the same tribe. The disputed matter in question arose from activity on the reservation, placing it squarely within the Williams v. Lee Analysis. 5

III. The Federal Social Security Act does not confer sole jurisdiction to the North Dakota courts and does not limit tribal sovereignty or Indian rights. 9

Conclusion 15

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES: PAGE

Califano v. Sanders, 430 US 99 (1977) 12

Fisher v. District Court, 424 U.S. at 388 47 L Ed2d 106, 96 S Ct 943 (1976) 4, 5, 6, 7, 8, 9

McClanahan v. Arizona State Tax Comm'n., 411 US 36 L Ed2d 129 93 S Ct 1257 (1973) 4, 5, 6

McKenzie County Social Services Board v. V.G., 392 NW 2d 399 (N.D. 1986) 5, 9

Merrion v. Jicarilla Apache Tribe, 455 US 130, 71 L Ed2d 21 1982 ..... 11 ,12

Mescalero Apache Tribe v. Jones, 411 US 145, 93 S Ct 1267, 36 L Ed2d 114 (1973) 6

Montana v. United States 450 US 544, 67 L Ed2d 493, 101 S Ct 1245 (1981) 4

Morton v. Mancari, 417 US 535 (1974) 11

United States v. Munsey Trust Co., 332 US 234, 91 L Ed 2022, 67 S Ct 1599 (1947) 6

New Mexico v. Mescalero Apache Tribe, 462 US at 332 (1983) 76 L Ed2d 611, 103 S Ct 2378 4

Nofire v. United States, 164 US 657 (1897) 6

Phoenix Insurance Company v. Erie Transportation Co., 117 US 312, 29 L Ed 873, 6 S Ct 750 (1886) 6

United States v. Quiver, 241 US 602, 60 L Ed 1196, 36 S Ct 699 (1916) 4, 6

Ramah Navajo School Board v. Bureau of Revenue, 458 US 832, 73 L Ed2d 1174, 102 S Ct 3394 (1982) 11

Rice v. Rehner, 463 US 713, 103 S Ct 3291 77 L Ed2d 961 (1983) 11

Santa Clara Pueblo v. Martinez, 436 US 49 (1978) 4, 12, 13

Squire v. Capoeman, 351 US 1 (1956) 11

Three Affiliated Tribes v. Wold Engineering 476 US ___, 90 L Ed2d 881, 106 S Ct ___ (1986) 3, 4

Williams v. Lee, 358 US 217, 3 L Ed2d 251, 79 S Ct 269 (1959) 6, 8, 9

STATE CASES:

State ex rel. Dept. of Human Serv. v. Jojola, 660 P2d 590 (1983) Cert. Den. 464 US 803 2

McKenzie County Social Services Board v. V.G., 392 NW 2d 399 (N.D. 1986) 5, 9

First National Bank of Minot v. MacDonald Const. Co., 137 N.W. 2d 667, (N.D. 1965) 6

UNITED STATES STATUTES:

Social Security Act, Child Support and Establishment of Paternity, 42 USC Section 651 et seq. 9, 12

TRIBAL LAW:

Tribal Code of the Three Affiliated Tribes, Chapter 1, Section 2.1; Chapter 12, Sections 1 through 27 7

JURISDICTIONAL STATEMENT

Contrary to Petitioners' assertions (Petition for Writ of Certiorari, p. 2), the North Dakota Supreme Court did not conclude that "....State laws.... were contrary to federal Indian law and policy." Rather it held that the state court lacked subject matter jurisdiction to hear and determine the petition for paternity because it was between Indians and involved a claim arising on an Indian reservation. The state law was simply held inapplicable in this instance. Thus 28 U.S.C. §1257(c)(1) does not compel review by this Court. No state statute was struck down nor found to be repugnant to the Constitution, treaties, or laws of the United States.

Neither did the North Dakota Supreme Court specially set up any right, privilege or immunity or claim any such right, privilege or immunity under the Constitution treaties, or statutes of the United States. The North Dakota Supreme Court did not bestow special privileges or protections not recognized by federal Indian law. As such, neither can 28 U.S.C. 1257 (c)(2) compel review by this Court. The North Dakota Supreme Court correctly applied federal law in determining that the exercise of state jurisdiction in this instance would infringe on the right of Indians to govern themselves.

Petitioners further urge the application of Rule 17.1(b), Rules of the Supreme Court of the United States,

contending that the North Dakota Supreme Court has decided a federal question in a way in conflict with the decision of the New Mexico Supreme Court, **State ex rel. Dept. of Human Serv. v. Jojola,** 660 P2d 590 (1983), Cert. Den. 464 U.S. 803. However, subsequent to the filing of an appeal in **Jojola,** supra, the case became moot because the Respondent Human Services Department adopted the position urged by Petitioner Jojola. There was no justiciable case or controversy because the Department codified its policy decision to defer to Indian Tribal sovereignty in paternity determinations. **Jojola v. State of New Mexico,** No. 82-2049, Motion of Appellee to Dismiss, page 5, July 12, 1983. Formal changes in the Department's policy went beyond a mere cessation of challenged activity: the deferral to Indian Tribal sovereignty in paternity determinations is enforced by the courts in New Mexico as the law of the state. Therefore, despite the decision by the New Mexico court, the apparent conflict is rendered moot and Rule 17.1(b) does not compel review either.

STATEMENT OF THE CASE

The following additional facts should be added to those presented in Petitioners' Statement of the Case:

The McKenzie County Social Services

entered into a Cooperative Agreement and Contract with the Three Affiliated Tribes of Fort Berthold, pursuant to federal law, for the processing of paternity and child support cases in Tribal Court involving Tribal members on June 15, 1984. The Agreement was signed by the parties five months before the present matter was filed in the State District Court, November 7, 1984. Subsequently, Petitioners refiled in State District Court on January 15, 1985, exactly seven months after the Cooperative Agreement was entered into.

ARGUMENT

I.

PETITIONERS' ASSERTIONS FLY IN THE FACE OF ONE HUNDRED FIFTY YEARS OF FEDERAL INDIAN LEGAL HISTORY AND THE DECISIONS OF THIS COURT RECOGNIZING THE RIGHT OF INDIAN TRIBES TO EXCLUSIVE JURISDICTION OVER THE DOMESTIC RELATIONS OF THEIR MEMBERS.

Recently this Court reasserted the long standing principle that a State may not infringe on the right of reservation Indians to make their own laws and be ruled by them. In **Three Affiliated Tribes v. Wold Engineering (Three Tribes II)**, 476 U.S. _____, 90 L. Ed. 2d 881, 106 S

Ct _____ (1986), this Court, in striking down a North Dakota statute requiring the Tribes to consent to suit as defendant in order to use the State court as plaintiff, specifically noted that the determination of parentage of children and obligations for the support of children "... clearly encompass areas of traditional tribal control ..." relative to Indian children. **Three Tribes II**, supra, citing **Fisher v. District Court**, 424 US, at 388-389, 47 L Ed2d 106, 96 S Ct 943 (1976) and **United States v. Quiver**, 241 US 602, 60 L Ed 1196, 36 S Ct 699 (1916); See also **Montana v. United States**, 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981); **Santa Clara Pueblo v. Martinez**, 436 US 49 (1978). In noting that the North Dakota statute in question would have allowed state civil law to control "**... even in cases that arise on the reservation, that involve only Indians, and that concern subjects which are within the jurisdiction of the tribal court...**" **Three Tribes II**, supra at 883, (emphasis added), this Court concluded that such a result simply could not be reconciled with Congress' jealous regard for Indian self-governance. "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" **New Mexico v. Mescalero Apache Tribe**, 462 US, at 332 (1983) 76 L Ed 2d 611, 103 S Ct 2378 (quoting **McClanahan v Arizona State**

Tax Comm'n., 411 US, at 171-172, 36 L Ed 2d 129, 93 S Ct 1257 (1973).

The executive branch of the federal government has also found that Tribes exercise exclusive jurisdiction over domestic relations. Powers of Indian Tribes, 55 I.D. 14, October 25, 1934, 1 Opinions of the Solicitor, Department of the Interior, 445.

II.

THIS IS A CASE TO DETERMINE PATERNITY BETWEEN ENROLLED MEMBERS OF THE SAME TRIBE. THE DISPUTED MATTER IN QUESTION AROSE FROM ACTIVITY ON THE RESERVATION, PLACING IT SQUARELY WITHIN THE WILLIAMS v. LEE ANALYSIS.

In **McKenzie County Social Services Board v. V.G.**, 392 NW2d 399 (N.D. 1986), every activity giving rise to the paternity claim between mother and Respondent occurred while they were both residents of their own reservation. North Dakota merely received an assignment from the Indian mother of the child of all rights to any support she may have on her own or on behalf of the minor child. Clearly, the Indian mother could not have sued Respondent for paternity in the North Dakota District Court because the paternity proceeding is litigation arising on the Indian Reservation. **Fisher v. District Court**, supra, 424 U.S. at 389.

North Dakota was subrogated to the claims of the Indian mother. The state's claims are no greater than those of the Fort Berthold Indian mother. **United States v. Munsey Trust Co.**, 332 U.S. 234, 91 L.Ed 2022, 67 S Ct 1599 (1947); **Phoenix Insurance Company v. Erie Transportation Co.**, 117 U.S. 312, 29 L. Ed. 873, 6 S Ct 750 (1886); **First National Bank of Minot v. MacDonald Const. Co.**, 137 N.W.2d 667, 672 (N.D. 1965).

The Williams test, **Williams v. Lee**, 358 US 217, 3 L.Ed. 2d 251, 79 S Ct 269 (1959) requires that a reviewing court determine whether the assertion of state court jurisdiction infringes on the right of reservation Indians to make their own laws and be ruled by them. It is difficult to perceive a matter more critical to the self-government of Indian people than the jurisdiction to establish parentage and the family relationship. **Nofire v. United States**, 164 U.S. 657 (1897); **Fisher**, supra; **Quiver**, supra.

This Court further concluded in **Fisher**, supra, that since the litigation therein involved only Indians, at least the same standard set forth in **Williams**, supra, must be met before state courts may exercise jurisdiction. Citing **Mescalero Apache Tribe v. Jones**, 411 U.S. 145, 148, 93 S Ct 1267, 36 L. Ed. 2d 114 (1973) and **McClanahan**, supra. Thus, contrary to Petitioners' assertion, the **Williams** test has been properly applied in this matter. There were no "off reservation activities" of the Tribal members herein relative to the paternity question. The record discloses

none. There is no ground why this cause should be reviewed by this Court.

The 1851 Treaty of Fort Laramie reserved land for the Arickara, Mandan and Hidatsa Tribes (Three Affiliated Tribes of Fort Berthold). Such treaty did not confer state jurisdiction or subject the Tribes to such jurisdiction. In 1935, the Tribes adopted a constitution and bylaws pursuant to Section 16 of the Indian Reorganization Act,[1] which as this Court noted in **Fisher**, supra, was an act specifically intended to encourage Indian tribes to revitalize their self-government. The powers of the Tribes stated therein were powers reserved by Indian Tribes, not powers conferred upon them. Pursuant to the Constitution and Bylaws of the Three Affiliated Tribes, a Tribal Court was established and vested with jurisdiction to extend "to all cases and controversies in law, equity and custom arising under the laws of the Three Affiliated Tribes." Chapter 1, Section 2.1, Fort Berthold Tribal Code. Further, Chapter 12, Sections 1 through 27 grants jurisdiction to the Tribal Court over paternity actions among Tribal members. The Three Affiliated Tribes clearly have acknowledged and exercised their inherent

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1. The Constitution and Bylaws have been amended by the Tribes eight times, the last being approved by the Secretary of the Interior, June 18, 1985.

sovereign power to determine domestic relations among tribal members. To subject this important paternity determination to state court jurisdiction clearly would infringe on the right of Indians to make their own laws and be ruled by them. **Williams**, supra.

In **Fisher**, supra, this Court stated:

> **State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court.** It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court
>
> Since the adoption proceeding is appropriately characterized as litigation arising on the Indian Reservation, the jurisdiction of the Tribal Court is exclusive.

Fisher, supra, at 387, 388 (Emphasis added).

This Court in **Fisher**, supra, plainly applied the interference and infringment test of **Williams**, supra, in a setting factually similar to the instant one. The determination of domestic relations between Tribal members is traditionally and currently a matter exclusively for Tribes to decide. To do otherwise and allow a state to make such determinations infringes on the

right of Indians to make their own laws and be governed by them.

The activities which are at the center of this matter undeniably occurred on the Fort Berthold Indian Reservation. **McKenzie County v. V.G.**, supra. No activity relevant to a determination of paternity between Tribal members occurred off the reservation. Thus, the North Dakota Supreme Court applied the infringement analysis of **Williams**, supra, and **Fisher**, supra. No new privilege was created. No new status was created. The North Dakota Supreme Court did not misapply or ignore federal Indian law as Petitioners contend. It did not create a new rule of law. The North Dakota Supreme Court properly followed the mandate of this Court in **Fisher**, supra. There is no treatment of a federal question in that decision which would require a review by this Court.

III.

THE FEDERAL SOCIAL SECURITY ACT DOES NOT CONFER SOLE JURISDICTION TO THE NORTH DAKOTA COURTS AND DOES NOT LIMIT TRIBAL SOVEREIGNTY OR INDIAN RIGHTS.

Under the Social Security Act, Child Support and Establishment of Paternity, 42 USC Sections 651 through 663, a State plan must comply with the federal requirements for the state to participate in the program. **King v. State**, 392 U.S. 309 (1968). The federal authority

requires, in part:

> A state plan for aid and services to needy families with children must: ... provide that the State has in effect a plan approved under part D (42 U.S.C. 651 et seq.) and operate a child support program in conformity with such plan. 42 U.S.C. § 602.

Said plan then triggers the following requirement:

> **provide for entering into cooperative arrangements with appropriate courts and law enforcement officials** (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan; 42 U.S.C. 654 (7).

> It is further provided under the Act that :

> (4)(B) in the case of any child with respect to whom such assignments is effective, to secure support for such child from his parent (or from any other person legally liable for such support)...utilizing any reciprocal arrangements adopted with other States..., 42 U.S.C. 654 (4)(B) (emphasis added).

The rule established by a series of cases in this Court in resolving issues of whether a general federal act limits tribal sovereignty or other federally guaranteed Indian rights is that Indian rights will not be deemed affected unless there are clear indications that Congress intended

to limit or extinguish such rights. **Merrion v. Jicarilla Apache Tribe,** 455 U.S. 130, 71 L.Ed.2d 21 (1982) (finding no clear indications that Congress intended implicitly to deprive the Tribe of taxing power in enacting, inter alia, national energy legislation); **Squire v. Capoeman,** 351 U.S. 1 (1956) (held general federal income tax inapplicable to income from trust allotments in light of language and purpose of the General Allotment Act); **Morton v. Mancari,** 417 U.S. 535 (1974) (held Equal Employment Opportunity Act of 1972, guaranteeing nondiscrimination in federal employment, did not repeal preexisting Indian preference statutes); **Rice v. Rehner,** ____ U.S. ____, 103 S Ct 3291 (1983) (repeal by implication of an established tradition of Indian immunity or self-governance is disfavored).

In those instances where the conflicting general federal law is one regulating Indians in Indian country, the Supreme Court has said that such statutes should be construed to comport with principles of tribal sovereignty. In **Ramah Navajo School Board v. Bureau of Revenue,** ____ U.S. ____, 73 L.Ed.2d 1174, 102 S Ct 3394 (1982), the Court said:

> We have consistently admonished that federal statutes and regulations relating to Tribes and tribal activities must be "construed generously in order to comport with...traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence. **White Mountain, supra,** 448 U.S., at 144; see also **McClanahan v. Arizona State Tax Comm'n,** 411 U.S., at 174-175 and n 13 (1973);

> **Warren Trading Post Co. v. Arizona Tax Comm'n,** 380 U.S., at 690-691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

Id., 73 L.Ed.2d 1174 at 1185; accord, **Merrion v. Jicarilla Apache Tribe,** supra; **Santa Clara Pueblo v. Martinez,** supra.

It is presumed that Congress would have included an express grant of jurisdiction to North Dakota if it had so intended for when Congress legislates on jurisdictional matters, it does so with the knowledge of the current state of the law. **Califano v. Sanders,** 430 U.S. 99 (1977).

First, as discussed above, there is no Congressional intent manifested to actually confer jurisdiction in this type of case solely on state courts. Rather, the legislation encourages intergovernmental cooperation in support collection. In addition to the general provision dealing with intergovernmental cooperation at 42 U.S.C. 654(9), the applicable federal regulations, 42 C.F.R. 302.34, require the states to enter into "cooperative arrangements with appropriate courts and law enforcement officials" to enforce support obligations. Thus the Congressional mandate is not for states to engage in disruptive

intergovernmental litigation, but to work cooperatively with the "appropriate courts". Applying this Congressional mandate to this cause, this paternity and child support claim is properly in Tribal court.

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. See, e.g., **Fisher v. District Court**, 424 U.S. 382 (1976): **Williams v. Lee**, 358 U.S. 217 (1959). See also Ex parte Crow Dog. 109 U.S. 556 (1883). [Footnote omitted].

Santa Clara Pueblo v. Martinez, supra.

However, the need for this recitation of authority pales, and one must question Petitioners' sincerity, when we find that McKenzie County entered into a cooperative agreement and contract with the Three Affiliated Tribes to pursue these paternity and child support matters in Tribal Court a full five months prior to having filed this matter in state district court. The undisputed record also shows that McKenzie County was during all times pertinent to this cause, and still is, pursuing one or more matters relative to paternity and support in Tribal Court. The Chairman of the McKenzie County Social Services Board and the Director both signed the agreement.

Petitioners cannot obscure the facts to create an issue by suggesting that the North Dakota Sureme Court somehow misapplied federal law. Petitioners used the federal law to enter into the enforcement agreement with

the Three Affiliated Tribes. Now they are attempting to tell this Court that federal law has been misapplied because the North Dakota Supreme Court agreed that the Tribal Court is indeed the proper forum to determine the all important question of paternity among Tribal members. This is not just an "off-reservation determination of paternity for purposes of enforcement of support" (Petition for Writ, page 11). Paternity actions cannot be classified into an order of diminishing importance. The child in question here, her children, and her children's children will all be affected Tribal members. The Petitioners' cavalier attitude toward a determination of paternity (Petition for Writ, page 11) is precisely why this Court has repeatedly held that Indian Tribes have the sovereign power to determine domestic relations among Tribal members. Even before a paternity determination has been reached herein, Petitioners have accused Respondent of avoiding his responsibility as a parent. Respondent, however, and the North Dakota Supreme Court, have merely demonstrated where a determination of paternity must be reached: in the Tribal Court of the Tribal members herein.

In summary, Petitioners have failed to present any legally cognizable basis upon which this Court could reasonably exercise it **certiorari** authority. The decisions of this Court amply justify a denial of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW M. SMALL
Suite 2101, Sheraton Plaza
27 North 27 Street
Billings, Montana 59101
(406) 259-2518
Attorney for Respondent